

No. 18-16663

IN THE
United States Court of Appeals for the Ninth Circuit

CITY OF OAKLAND, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Oakland City Attorney Barbara J. Parker; CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the San Francisco City Attorney Dennis J. Herrera,
Plaintiffs-Appellants,

v.

B.P. P.L.C., a public limited company of England and Wales;
CHEVRON CORPORATION, a Delaware corporation;
CONOCOPHILLIPS, a Delaware corporation;
EXXON MOBIL CORPORATION, a New Jersey corporation;
ROYAL DUTCH SHELL PLC, a public limited company of England and Wales;
and DOES, 1 through 10
Defendants-Appellees.

On Appeal from The United States District Court, Northern District of California
Case Nos. 3:17-cv-06011-WHA, 3:17-cv-06012-WHA (Hon. William H. Alsup)

MOTION TO ASSIGN APPEALS TO A SINGLE PANEL

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INTRODUCTION

Defendants in the above-captioned action hereby move to assign the pending appeal in No. 18-16663 (the “Alsup Appeal”) to the same panel that will hear the consolidated appeals in Nos. 18-15499, 18-15502, 18-15503, and 18-16376 (the “Chhabria Appeals”).¹ Plaintiffs in the Alsup Appeal do not oppose the motion, but Plaintiffs in the Chhabria Appeals have indicated that they do oppose.

These appeals arise out of remand and dismissal motions in actions filed by counties and municipalities in California against energy and mining companies seeking to impose tort liability for alleged climate-change related harms based on Defendants’ production and promotion of fossil fuels. The factual and legal theories in these cases are virtually identical, and the legal issues on appeal are also related. The overlap among the issues on appeal is highlighted by the fact the parties in the Alsup Appeal have incorporated by reference the briefs filed in the Chhabria Appeals. Moreover, all of the Defendants in the Alsup Appeal are also Defendants in the Chhabria Appeals.

Because these appeals address many of the same issues involving many of the same defendants, and because Plaintiffs in all eight cases are now represented

¹ Many of the Defendants intend to challenge personal jurisdiction in California, and this motion is submitted subject to and without waiver of any defense, affirmative defense, or objection, including personal jurisdiction, insufficient process, or insufficient service of process.

by the same private attorneys, assigning them to a single panel will promote judicial economy and serve the interest of justice. *United States v. Washington*, 573 F.2d 1121, 1123 (9th Cir. 1978).

FACTUAL AND PROCEDURAL BACKGROUND

1. Each of the underlying cases was brought by a city or county in California seeking redress for alleged global-warming related harms against Defendants based on their production, promotion, and sale of fossil fuels. Each action was originally filed in state court in California and removed by Defendants to federal court in the Northern District of California, asserting virtually identical grounds for removal as to each action. Six of these actions were assigned to Judge Chhabria.² Two were assigned to Judge Alsup.³

Plaintiffs moved to remand each action, again relying on almost identical arguments. Judge Chhabria and Judge Alsup reached divergent results on the remand motions. Judge Alsup, acting first, denied remand on February 27, 2018,

² *County of San Mateo v. Chevron Corp.*, et al., No. 3:17-cv-04929-VC; *City of Imperial Beach v. Chevron Corp.*, et al., No. 3:17-cv-04934-VC; *County of Marin v. Chevron Corp.*, et al., No. 3:17-cv-04935-VC; *County of Santa Cruz v. Chevron Corp.*, et al., No. 3:18-cv-00450-VC; *City of Santa Cruz v. Chevron Corp.*, et al., No. 3:18-cv-00458-VC; *City of Richmond v. Chevron Corp.*, et al., No. 3:18-cv-00732-VC (together the “Chhabria Actions”).

³ *City of Oakland v. BP P.L.C. et al.*, No. 3:17-cv-06011-WHA, and *City and County of San Francisco v. BP P.L.C. et al.*, No. 3:17-cv-06012-WHA (together, the “Alsup Actions”).

holding that “Plaintiffs’ nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law.” Exhibit A at 3. Because Plaintiffs’ claims “depend on a global complex of geophysical cause and effect involving all nations of the planet (and the oceans and atmosphere),” and “necessarily involve[] the relationships between the United States and all other nations,” Judge Alsup held that the claims must “be governed by as universal a rule of apportioning responsibility as is available.” *Id.* at 8. He held that “[f]ederal jurisdiction is therefore proper.” *Id.*

Less than one month later, Judge Chhabria reached the opposite conclusion and *granted* motions to remand filed by the counties of Marin and San Mateo, and the City of Imperial Beach. Exhibit B. Judge Chhabria expressly “disagree[d]” with Judge Alsup’s decision and held that, because the otherwise applicable “federal common law is displaced by the Clean Air Act not only when plaintiffs seek injunctive relief to curb emissions but also when they seek damages for a defendant’s contribution to global warming,” “federal common law does *not* govern their claims.” *Id.* at 2.⁴ On July 10, 2018, Judge Chhabria applied the same remand order to the cases brought by the County and City of Santa Cruz, and the

⁴ Defendants appealed on March 26, 2018. See San Mateo, No. 17-cv-04929-VC, ECF No. 232. Those appeals were docketed as Nos. 18-15499, 18-15502, 18-15503.

City of Richmond. Exhibit C (granting remand “[f]or the reasons stated in th[e] Court’s prior order”).

Meanwhile, the parties briefed and argued motions to dismiss for failure to state a claim and for lack of personal jurisdiction in the Alsup Actions. On June 25, 2018, Judge Alsup dismissed plaintiffs’ complaints for failure to state a claim. *See, e.g., City of Oakland v. BP p.l.c. et al.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018). On July 27, 2018, Judge Alsup also dismissed for lack of personal jurisdiction as to certain defendants. *City of Oakland v. BP p.l.c.*, No. 3:17-cv-06011, ECF No. 287 at 5, 2018 WL 3609055.

2. Defendants appealed Judge Chhabria’s remand orders, and on August 20, 2018, this Court consolidated the Chhabria Appeals: Nos. 18-15499, 18-15502, 18-15503, 18-16376. Defendants filed their Opening Brief in the consolidated appeals on November 21, 2018. Defendants argued, *inter alia*, that Plaintiffs’ global warming claims are removable because they arise under federal common law. *See* No. 18-16376, ECF No. 27 at 29–38. Defendants also argued that the claims are removable regardless of the scope of displacement because displacement of federal common law does not eliminate federal jurisdiction over federal common law claims. *Id.* at 38–43. Defendants also contended that the claims were properly removed on the other grounds included in their notices of removal. *Id.* at 45–71.

Plaintiffs and Defendants both identified the San Francisco and Oakland actions as “related cases.” *See* No. 18-16376, ECF No. 27 at 83, ECF No. 38 at 64 (stating that Plaintiffs in the Chhabria appeals are “unaware of any related cases currently pending in this court *other than the case(s) identified in the initial briefs by [Defendants]*”) (emphasis added). Briefing was completed on March 14, 2019. *See* No. 18-16376, ECF No. 38; No. 18-16376, ECF No. 76. On June 11, 2019, this Court issued a notice that the Chhabria Appeals were being considered for an upcoming oral argument calendar in San Francisco and asked counsel for any conflicts with the October, November, or December sitting dates.

3. Meanwhile, San Francisco and Oakland appealed Judge Alsup’s orders (1) denying remand, (2) dismissing for failure to state a claim, and (3) dismissing certain Defendants for lack of personal jurisdiction, and those appeals were docketed as No. 18-16663. Plaintiffs requested a 77-day extension to file their Opening Brief. Because Defendants intended to seek coordination of the various appeals and assignment to the same panel, they were concerned that such a lengthy extension would put the Alsup Appeal far behind the Chhabria Appeals despite the similar timing of the district court dispositions on appeal. Accordingly, Defendants sought the Plaintiffs’ consent at that time to coordination of the two sets of appeals and Plaintiffs agreed. Defendants then consented to Plaintiffs’ extension request. *See* ECF No. 24.

Plaintiffs filed their Opening Brief on March 13, 2019. No. 18-16663, ECF No. 30. Plaintiffs argue, *inter alia*, that Judge Alsup erred in denying their motion to remand because their claims do not arise under federal common law. *Id.* at 9–18. Addressing Defendants’ other grounds for removal, Plaintiffs argue that, “for the reasons stated by the Plaintiffs-Appellants [sic] in [the Chhabria Appeals]—which arguments the People hereby incorporate by reference—none of those additional grounds permits the exercise of federal subject matter jurisdiction either.” *Id.* at 18–19. Plaintiffs also contend that Judge Alsup erred by dismissing their claims under Rule 12(b)(6), and that he erred by dismissing the claims against the four out-of-state Defendants for lack of personal jurisdiction.

Defendants filed their Answering Brief on May 10, 2019. No. 18-16663, ECF No. 78. Defendants also incorporated by reference the arguments made by the Defendants in the Chhabria Appeals. No. 18-16663, ECF No. 78 at 36 n.11. Plaintiffs filed their reply brief on July 1, 2019.

Plaintiffs and Defendants in the Alsup Appeal identified the Chhabria Appeals in their Statements of Related Cases. No. 18-16663, ECF No. 30 at 77, ECF No. 78 at 62.

4. Although Plaintiffs in the actions before Judge Chhabria and Judge Alsup were represented by separate counsel during all trial court proceedings, all

Plaintiffs are now represented by the same counsel, Sher Edling. *See* No. 18-16663, ECF No. 23-1; *see id.*, ECF No. 23-2 ¶ 6.

ARGUMENT

The Court has discretion to calendar together cases raising the “same issues” so that they “may be heard at the same time.” Ninth Cir. Gen. Order 3.3(c). Assigning these appeals to the same panel would promote judicial economy and serve the interests of justice for several reasons. First, as set forth above, the cases involve many of the same claims, factual allegations, events, and legal theories. Second, they involve an overlapping group of defendants. BP, Chevron, ConocoPhillips, Exxon Mobil, and Royal Dutch Shell—the only Defendants in the Alsup Appeal—are also Defendants in the Chhabria Appeals. Third, several of the issues presented in the Chhabria Appeals—including whether global warming claims are governed by federal common law, whether such federal common law claims are displaced by the Clean Air Act, whether displacement affects jurisdiction, and whether global warming claims are removable on any other ground—have also been raised by Plaintiffs in the Alsup Appeal. Indeed, both Plaintiffs and Defendants in the Alsup Appeal incorporated by reference the briefs filed in the Chhabria Appeals. And Plaintiffs in all eight appeals are now represented by the same counsel. Finally, because the briefing in the Alsup Appeal

is now complete, the argument could be set alongside the Chhabria Appeals later this year without prejudicing the Plaintiffs in the Chhabria Appeals.⁵

In short, assigning these appeals to the same panel would promote judicial efficiency and advance the interests of justice. *See Washington*, 573 F.2d at 1123.

CONCLUSION

For the reasons articulated above, Defendants respectfully request that this Court assign the Appeal in No. 18-16663 to the same panel that will hear the appeals in Nos. 18-15499, 18-15502, 18-15503, and 18-16376.

Dated: July 1, 2019

Respectfully submitted,

⁵ Alternatively, the appeals could both be scheduled for argument before the same panel in early 2020.

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**** Pursuant to Ninth Circuit L.R. 25-
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CERTIFICATE OF COMPLIANCE

I certify that:

This motion complies with the type-volume limitation of Circuit Rules 27-1(1)(d) and 32-3(2) because the motion contains 1,719 words, excluding the parts of the brief exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016, Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: July 1, 2019

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